Supreme Court, U.S.
FILED
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(1)

No. 97-461

In The

Supreme Court of the United States

October Term, 1996

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United State Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action which asserted only federal claims under 42 U.S.C. § 1983, must the appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which would be dismissed in any court?

LIST OF PARTIES

Respondent, KEITH D. SCHACHT, is referred to as "plaintiff." He sued, as defendants, WISCONSIN DEPARTMENT OF CORRECTIONS, and the following employes of Oakhill Correctional Institution: CATHERINE J. FARREY, individually and in her official capacity as warden, CYNTHIA O'DONNELL, individually and in her official capacity as associate warden, RITA SMICK, individually and in her official capacity as personnel manager, THOMAS LALIBERTE, individually and in his official capacity as an employe, RANDALL HEPP, individually and in his official capacity as an employe, and ONE OR MORE JOHN DOES, individually and in their official capacity as employes. Defendant, Wisconsin Department of Corrections, a State agency, employs the individual defendants and operates Oakhill Correctional Institution. Although plaintiff never amended his pleadings to name the unnamed defendants, he tried, through a brief to the district court filed shortly before the trial date, to add another Oakhill employe, B.J. MIKKLESON.

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PETITION FOR WRIT OF CERTIORARI

Defendants respectfully request that a writ of certiorari issue to review the appellate court decision. The appellate court vacated summary judgment for defendants, and remanded the entire case to State court, solely because plaintiff, who never objected to removal, asserted federal claims against the State of Wisconsin under 42 U.S.C. § 1983 which would be dismissed in any court. Granting certiorari would allow the Court to more fully address important issues implicated by City of Chicago v.

International College of Surgeons, No. 96-910, 117 S.Ct. 1424 (1997) which, the parties in City of Chicago acknowledge in their briefs, are not adequately presented by the facts in that case.

OPINIONS BELOW

The appellate court opinion is reported (Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997)) and reprinted at App. 1-6. The district court opinion is unreported and reprinted at App. 7-14.

JURISDICTION

The decision was issued June 17, 1997. (App. 1.) The Petition is timely. Jurisdiction is invoked under 28 U.S.C. § 1254(1). The district court entered a judgment on the merits. App. 14. The appellate court had jurisdiction under 28 U.S.C. § 1291, vacated that judgment and directed a remand to the State court of this removed action. App. 6. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Grubbs v. General Electric Credit Corp., 405 U.S. 699, 700 (1972).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U. S. Const. amend. XI provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Wis. Const. art. IV, § 27 provides:

> **Suits against state.** SECTION 27. The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343(a)(3) provides:

> **(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 1441 provides in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district

courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Under 42 U.S.C. § 1983, Schacht filed an action in Wisconsin circuit court asserting the Due Process Clause of the Fourteenth Amendment (U.S. Const. amend. XIV) was breached in his being suspended without pay in January 1993, while work rule violations were

investigated, and discharged in February 1993 based on work rule violations. App. 1-2; 9-10. Defendants removed to federal court on a timely basis and Schacht never questioned the propriety of that removal until the appellate court, during oral argument following full briefing on the merits, called for supplemental briefs on that issue. App. 3, 5.

Granting defendants' dispositive motions, the district court had (a) dismissed claims against the State agency and official capacity claims on Eleventh Amendment grounds, (b) denied Schacht's request to name a new defendant, (c) found Schacht had asserted no substantive due process claims, and (d) granted summary judgment to defendants on the remaining individual capacity claims. App. 10-14. In his appeal, Schacht had not challenged the dismissal of either his claims against the State agency or his official capacity claims.

REASONS FOR GRANTING THE WRIT

The appellate decision is contrary to numerous established holdings of this Court and turns the shield of Eleventh Amendment immunity into a sword plaintiffs may unilaterally choose to wield against States.

The appellate court decision turns on reasoning contrary to numerous principles carefully developed by this Court which the appellate court itself has, in other contexts, acknowledged and applied. The appellate court decision assumed district courts have original jurisdiction in a civil action only if they can fully adjudicate every claim that is pled. Since Eleventh Amendment immunity, if asserted by a defendant, can prevent district courts from

fully adjudicating claims made against States, the appellate court, having made this assumption, felt compelled here to question the propriety of removal on its own motion, to vacate the district court disposition on the merits, and to require a remand to State court. This conclusion ignored the important distinctions between Eleventh Amendment immunity, which is for States to raise and which may be waived, and other types of jurisdictional bars. This conclusion also ignored this Court's prior signals that the definitional problem with claims under 42 U.S.C. § 1983 against States, that States are not "persons" under 42 U.S.C. § 1983, is a threshold barrier which made it entirely unnecessary to consider any jurisdictional effect Eleventh Amendment immunity might have had on the propriety of removal.

The appellate court decision allows plaintiffs, by including federal claims so flawed they could not be fully adjudicated in any court, both to avoid removal of viable federal claims and to deprive states of rights which Congress intended to grant all defendants. A writ of certiorari should issue.

A. The appellate court improperly construed "original jurisdiction" in 28 U.S.C. § 1441 to require an ability to fully adjudicate all claims a plaintiff pled in State court.

When a plaintiff, as here, never objects to removal and the district court proceeds to judgment, "the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." Grubbs v. General Electric

Credit Corp., 405 U.S. 699, 702 (1972). The appellate court correctly observed elsewhere that "[j]urisdiction exists in a removal action if the case might have been brought in federal court to begin with. [Citing Grubbs.]" Shaw v. Dow Brands, Inc., 994 F.2d 364, 366 (7th Cir. 1993).

In the decision below, however, the appellate court dramatically deviated from the Grubbs standard through a set of assumptions drawn from its own decisions. (App. 3-4 citing Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994), *reh'g and reh'g en banc denied, cert. denied*, 513 U.S. 876 (1994); Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *cert. granted*, 117 S.Ct. 1424 (1997); Gorka by Gorka v. Sullivan, 82 F.3d 772, 773 (7th Cir. 1996), *reh'g and reh'g en banc denied*.) It instead declared that a district court has jurisdiction in a removed action "only where the district court has the authority to **adjudicate all** of the claims" and that, to make removal proper, the district court "must" have had the power to "**determine all** the issues in the case." App. 3, emphasis added.

It then concluded that, because Eleventh Amendment immunity could be asserted against § 1983 claims made against the State, the district court lacked authority to fully adjudicate every federal claim plaintiff made under 42 U.S.C. § 1983. App. 3-5. This inability to adjudicate every claim was characterized as an "Achilles' heel" which rendered district court jurisdiction over this action void from the outset. App. 3. As a result, the appellate court believed it had to raise this issue at oral argument, on its own motion, and then vacate the district court judgment and direct a remand to State court. App. 5-6.

By erroneously assuming a district court has no original jurisdiction over a civil action unless it has the

power to fully adjudicate every claim a plaintiff may make, the appellate court decision grants plaintiffs the ability to bar States from removing cases with only federal claims. All a plaintiff needs to do to avoid removal is assert one claim which could be barred by Eleventh Amendment immunity. Eleventh Amendment immunity, by this decision, is transformed from a shield appropriate to a fellow sovereign in a federal system into a sword which plaintiffs can unilaterally use, contrary to Congressional intent, to demote States to second-class litigants. The assumptions made by the appellate court are erroneous on several levels.

The only claims plaintiff asserted here were claims under the Due Process Clause of the Fourteenth Amendment to the United States Constitution as to which plaintiff expressly sought relief in his complaint under 42 U.S.C. § 1983. Had plaintiff filed this action in federal court, therefore, the district court, subject to two inapplicable and narrow exceptions,[1] would necessarily

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[1]Bell articulated two narrow exceptions, i.e., (1) that the claim "clearly appears to be immaterial and made solely to obtain jurisdiction" and (2) that the claim is "wholly insubstantial and frivolous." 327 U.S. at 682. Both were both plainly inapplicable. *See also* Jackson Transit Authority v. Transit Union, 457 U.S. 15, 21, n.6 (1982); Kennedy v. Connecticut General Life Ins. Co., 924 F.2d 698, 700 (7th Cir. 1991) ("subject-matter jurisdiction depends on an arguable claim, not on success"). Lewis v. U.S., 70 F.3d 597 (Fed. Cir. 1995) recently confirmed that this Court's holdings restrict the first Bell exception to situations where the plaintiff is not actually relying on the federal statute to assert the claim and restrict the second Bell exception to situations where it is "'very plain'" that the alleged federal claim is frivolous. 70 F.3d at 603-04. Though agreeing with the district court in Lewis that the plaintiff's only claim, a federal claim, was frivolous and "meritless", the appellate court in Lewis held that it fell well

have had original jurisdiction over his claims since they sought recovery "under the Constitution or laws of the United States." Bell v. Hood, 327 U.S. 678, 682-83 (1946). *See also* 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Indeed, "where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for [those] possible exceptions . . . , **must** entertain the suit." 327 U.S. at 681-82, emphasis added. Plaintiff drafted his complaint to seek recovery, not just directly, but exclusively, under the Constitution or laws of the United States.

While plaintiff's individual capacity claims were ultimately adjudicated on the merits, the district court dismissed plaintiff's § 1983 claims against the State agency and his official capacity claims. App. 10. The appellate court apparently viewed this ultimate conclusion as a fatal flaw which rendered the district court proceeding a nullity. App. 4-5. The appellate court's error -- deeming the district court to lack any original jurisdiction over exclusively federal claims because one claim, at the time of removal, will not likely proceed to full adjudication -- may be understandable. Justice Frankfurter noted long ago:

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." [Citation omitted.] Petitioner asserts a substantial claim [under a federal statute.] Such assertion alone is sufficient to empower the District Court to assume jurisdiction

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outside the narrow confines of the Bell exceptions and that the district court had jurisdiction over the complaint. 70 F.3d at 603-04.

> over the case and determine whether, in fact, the [statute] does provide the claimed rights. "A cause of action under the law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." [Citation omitted.]

Romero v. International Term. Operat. Co., 358 U.S. 354, 359 (1959), *reh'g denied*, 359 U.S. 962. Original jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1441 refers to the district court's threshold ability to consider a civil action, not whether individual claims may fall by the wayside before full adjudication on the merits.

Understandably, the looming presence of Eleventh Amendment immunity which plaintiff called into play by making claims against the State, and the box into which the appellate court had placed itself through Frances J. (*see* pp. 11-13 *infra*), increased the risk of confusion here. As Justice Thomas observed while an appellate judge:

> Given the wooliness of the concept [of federal jurisdiction], it is hardly surprising that there exists a significant gray area between grounds of decision that clearly are jurisdictional and grounds that clearly are not. . . . [Even where distinctions are made routinely,] the distinctions can prove elusive. [Citations omitted.] . . . . To complicate matters further, some provisions--the eleventh amendment, for example--can be jurisdictional in some contexts, and non-jurisdictional in others. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 516, n. 19 . . . (1982) (stating that the eleventh amendment is not "jurisdictional in the

> sense that it must be raised and decided by this Court on its motion") *with Edelman v. Jordan*, 415 U.S. 651, 678 . . . (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.").

Cross-Sound Ferry Services, Inc. v. I.C.C., 934 F.2d 327, 341 (D.C.Cir. 1991) (Thomas, J., concurring in part).

The appellate court's decision in this action becomes harder to understand, however, in light of its recognition, in other decisions, both of this "wooliness" in Eleventh Amendment jurisdictional analysis and that it is not an issue the appellate court should raise on its own:

> The doctrine of Eleventh Amendment immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar. Unlike other forms of subject-matter jurisdiction, Eleventh Amendment immunity can, for example, be waived by consent. [Citation omitted.] The Supreme Court has declared, moreover, that "we have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." [quoting Patsy.]

Komyatti v. Bayh, 96 F.3d 955, 959 n.4 (7th Cir. 1996).

Declaring that the propriety of removal is governed by whether one of a set of exclusively federal claims might be subject to Eleventh Amendment immunity is not only contrary to this Court's decisions and Congressional intent in enacting the removal statutes, it creates an unworkable

standard. A defendant served with a State court complaint which seems to assert claims barred by sovereign immunity would be placed in a dilemma Congress never intended. Plaintiffs, at times, allege "official capacity" claims so vaguely that it takes years, and multiple levels of courts, to sort out the allegations. *E.g.*, Shockley v. Jones, 823 F.2d 1068, 1070-72 (7th Cir. 1987) (difficult to detect Eleventh Amendment problems in vague pleadings); Jensen v. State Bd. of Tax Com'rs of State of Indiana, 763 F.2d 272, 278 (7th Cir. 1985) (same). In Shockley, the district court dismissed what it viewed as official capacity claims on Eleventh Amendment grounds. 823 F.2d at 1071-72. While acknowledging how confusing the distinctions can be, and were in Shockley, the appellate court ultimately concluded that plaintiffs' claims should be viewed as individual capacity claims. 823 F.2d at 1071-72.

Combining the Shockley setting with a hypothetical assumption that it commenced in State court exposes a significant gulf between the appellate decision in this case and any reasonable interpretation of the removal statutes. Under that hypothetical, if the case were removed before the State court was asked to address whether official capacity claims had been pled, would the propriety of removal hang in the balance pending ultimate resolution, on appeal, from a federal district court decision on that confusing issue? Alternatively, if removal efforts were deferred to obtain dismissal by the State court of what reasonably seemed to be official capacity claims, and the State court instead unexpectedly found only individual capacity claims were pled, would the removal option have been lost through untimeliness because defendants relied on plaintiffs' pleadings? 28 U.S.C. § 1447.

These questions need not be answered because Eleventh Amendment immunity simply is not the bar to removal detected by the appellate court decision in this

action. Eleventh Amendment immunity is instead a defense a State can choose to assert. Whether it does or does not ultimately do so hardly constitutes an "Achilles' heel" which bars removal at the door to the federal courts. App. 3. Actually, the choice of that analogy by the appellate court is telling. Eleventh Amendment immunity is not a breach in a State's protective armor by which a losing opponent may, on appeal, fatally defeat the State's removal efforts. *Cf.* Gorka, 82 F.3d at 773 (Eleventh Amendment immunity should only be a shield against State liability, not a "sword" States can wield). The appellate court goes farther than even this analogy allows since plaintiff, unlike Hector who at least had to fire a well-aimed arrow, did not take any action other than to plead baseless federal claims which would be dismissed in any court. The appellate court decision in this action so completely turns the protective nature of Eleventh Amendment immunity on its head that even district courts bound by Frances J. and its progeny have not read those decisions that broadly. *E.g.*, Smith v. Milwaukee County, 954 F.Supp. 1314, 1318, text and n.4 (E.D.Wis. 1997) (noting holdings in Frances J. and Gorka but declining to remand because the plaintiff there did not object to removal and Eleventh Amendment was not raised as a jurisdictional bar).

In the removal context, the decision below renders States second-class litigants. States should have the same rights as other litigants, when involuntarily brought into court on solely federal claims, to choose whether to remove those claims to federal court. Where federal question jurisdiction is the basis for removal, the Court long ago rejected any reading of the removal statutes grounded on "the character of the parties" rather than whether claims arise under the Constitution and laws of the United States.

E.g., Ames v. Kansas, 111 U.S. 449, 470-72 (1884) (holding removal of action brought by a State is to be treated the same as any other removed action). *See also* Illinois v. City of Milwaukee, 406 U.S. 91, 100-101 (1972). Yet the appellate court below would preclude removal of actions asserting solely federal claims because, based on the character of the defendants as a State agency and State officials, sovereign immunity could result in some claims being dismissed.

A sovereign State should not be treated as a second-class litigant when federal claims are made against the State. An alternative approach more respectful of state sovereignty would recognize that no jurisdictional analysis was required on appeal. Section 1983 claims against the State may be dismissed as a matter of statutory definition without considering Eleventh Amendment immunity at all.

B. Since States are, as a matter of statutory definition, not "persons" under 42 U.S.C. § 1983, it was unnecessary for the appellate court to consider the potential effects of Eleventh Amendment immunity on the district court's jurisdiction.

This Court has taken pains to clarify that it is unnecessary to focus on Eleventh Amendment immunity issues when analyzing requests for retrospective relief against States under 42 U.S.C. § 1983. Most recently, the Court reiterated in Arizonans for Official English v. Arizona, 117 S.Ct. 1055 (1997), that

> § 1983 actions do not lie against the State [citation omitted]. . . . The barrier [to the § 1983 claims] was not, as the Ninth Circuit [in that case] supposed, Eleventh Amendment immunity, which the State could waive. **The stopper was that § 1983 creates no remedy against a State."**

117 S.Ct. at 1069-70, emphasis added. In other decisions, the appellate court below had seemed to recognize that this definitional bar makes it unnecessary to reach Eleventh Amendment immunity. Instead, it is sufficient, to dismiss such claims, to simply note that "[p]ersonhood is an essential element of a § 1983 claim" and "a state is not a 'person' for purposes of § 1983." Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992), *reh'g and reh'g en banc denied*.

Though the appellate court below cited Arizonans for Official English for the general proposition that § 1983 actions do not lie against States (App. *), it overlooked the significance of the Court's distinction between Eleventh Amendment immunity and the statutory definition of "persons" in § 1983 and its critical notation that, while immunity could be waived, the "stopper was that § 1983 creates no remedy against a State." Arizonans for Official English, 117 S.Ct. at 1069-70. The appellate court decision in this action does not address that important distinction or its impact on the validity of its analysis.

When a case is removed which contains a claim under 42 U.S.C. § 1983 subject to potential dismissal based on Eleventh Amendment immunity, the point is that, though this immunity issue lurks dramatically in the background, the threshold inquiry is the non-jurisdictional bar derived from the definition of the word "person" in § 1983. As Arizonans for Official English recognized, the bar to a § 1983 claim against the State at the outset of an action is not necessarily Eleventh Amendment immunity -- which could ultimately drop away, based on waiver, as

an actual bar. The truly significant "stopper" is definitional, not jurisdictional, because Congress simply never intended to include States within its definition of "persons" in § 1983. 117 S.Ct. at 1069-70.

This distinction was first sharpened in Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Will examined whether § 1983 claims could be made against a State in its own courts -- where Eleventh Amendment immunity is unavailable. 491 U.S. at 63-64. In that factual setting, the Court expressly separated Eleventh Amendment jurisdictional analysis from the definitional analysis and focused completely on Congressional intent and statutory construction by a detailed study of applicable legislative history. 491 U.S. at 64-66. Though Will considered the existence of Eleventh Amendment immunity, and Congress' presumed respect for it, as confirmation that Congress intended to exclude States from the definition of "person," it appeared to establish that the definitional bar stood entirely on its own, regardless of Eleventh Amendment immunity, to defeat any § 1983 claim which sought retrospective relief from a State. 491 U.S. at 66-70.

Will underscored this apparent conclusion by leading off its citation of lower court decisions contrary to its holdings, i.e., those which had "taken the position that a State is a person" under § 1983, with a citation to Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986). It is significant in this action that Della Grotta had concluded the State was a person for § 1983 purposes **because** the State there had waived Eleventh Amendment immunity. 781 F.2d at 348-49. The dissent in Will specifically cited Della Grotta and noted that the majority was holding to the contrary:

> To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.
>
> This is indeed an exceptional holding. . . . [I]t also renders ineffective the choices some States have made to permit such suits against them. See, e.g., Della Grotta v. Rhode Island, 781 F.2d 343 (CA1 1986). . . .

Will v. Michigan Dept. of State Police, 491 U.S. 58, 85-86 (1989) (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting). Nothing in the majority opinion suggests that the dissent misread its holdings, and those holdings instead seemed to establish this definitional analysis as a bar to § 1983 claims against the States which is entirely separate from the bar of Eleventh Amendment immunity. Will, 491 U.S. at 60-71.

Any lingering doubt was dispelled the following term in Ngiraingas v. Sanchez, 495 U.S. 182 (1990) (Brennan & Marshall, J.J., dissenting). Ngiraingas addressed whether § 1983 claims could be made against territories, and the Court not only emphasized the distinction between the definitional analysis and the Eleventh Amendment analysis, it indicated that the definitional analysis should be conducted first. 495 U.S. at 183-92. The Court noted that the appellate court had not

reached any Eleventh Amendment analysis because, as a threshold matter, it had concluded that territories were not, as a matter of statutory construction, within the meaning of the term "persons" in § 1983. 495 U.S. at 185, n.2. Similarly, the Ngiraingas Court, despite the critique of the dissenting Justices noted below, conducted no Eleventh Amendment immunity analysis. 495 U.S. at 183-92. It instead inquired into this definitional analysis and found it to bar any § 1983 claims against territories, just as it bars such claims against States. 495 U.S. at 183-92.

Justices Brennan and Marshall, in dissent, expressly emphasized their view, contrary to the majority, that "the absence of any immunity on the part of Territories from congressional enactments" should have led to a conclusion in Ngiraingas that Territories, unlike States, were "persons" under § 1983. Ngiraingas, 495 U.S. at 193. Though the dissenting Justices addressed, in detail, the distinctions between States and Territories regarding Eleventh Amendment immunity (*id.*, 495 U.S. at 202-03), the Ngiraingas majority apparently saw no need, in justifying its decision, to examine immunity issues as part of that definitional analysis, or even to mention those issues once it concluded that Congress did not intend Territories to be "persons" under § 1983 (495 U.S. at 183-92).

The present significance of these messages from the Court is that it was unnecessary for the appellate court below to view Eleventh Amendment immunity as an absolute bar to removal and was also contrary to both Congressional intent underlying several statutory schemes and to this Court's designated methods of analysis. Instead, the appellate court should have recognized that, as a non-jurisdictional matter, § 1983 claims simply cannot be made against States and turned to the merits of the

appeal. This was the procedure followed by the Ninth Circuit Court of Appeals in Kruse v. State of Hawai'i, 68 F.3d 331 (9th Cir. 1995) which, sharply criticizing the rationale in Frances J., held that district courts should dismiss removed claims to which Eleventh Amendment immunity might apply by focusing on this definitional analysis rather than any jurisdictional questions. 68 F.3d at 334. *See also* Office of Hawai'ian Affairs v. Department of Educ., 951 F.Supp. 1484, 1489-90 (D. Hawai'i 1996) (comparing Frances J. and Kruse); Henry v. Metropolitan Sewer Dist., 922 F.2d 332, 338 (6th Cir. 1990).

Frances J., the primary decision on which the appellate court decision in this action was based, appeared driven by a concern that the State of Illinois may have removed to federal court to avoid having to address the merits of a particular claim, barred in federal court, as to which no similar bar existed in State court. 19 F.3d at 342-43. Having created the broad holdings in Frances J. in apparent response to a perceived defense strategy in that particular case, the appellate court placed itself in a box from which the appellate court decision in this action ultimately emerged. The impropriety of a judicial body restricting the original jurisdiction as defined by district courts in response to a perceived defense strategy in a particular case is disclosed by recognizing that the § 1983 claims against the State in this action would have also been dismissed by Wisconsin courts.

Had this action remained in Wisconsin court, the claims against the State agency and the official capacity claims would, without question, have been dismissed based on sovereign immunity under Wis. Const. art. IV, § 27, or based on failure to state claims on which relief may be granted, or on both grounds. *E.g.*, Lindas v. Cady, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989) (State agency may not be sued for monetary relief under 42 U.S.C. § 1983 since "states are not 'persons' within the meaning of sec. 1983"), *aff'g in part and rev'g in part*, 142 Wis. 2d

857, 419 N.W.2d 345 (Ct. App. 1987); Lindas v. Cady, 142 Wis. 2d 857, 861-62, 419 N.W.2d 345 (Ct. App. 1987), *aff'd in part and rev'd in part*, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989). *See also* Boldt v. State, 101 Wis. 2d 566, 584-85, 305 N.W.2d 133 (1981) ("There is no provision in the Wisconsin Statutes giving consent to sec. 1983 or other civil rights actions" against a State agency). The outcome as to the claims against the State agency and the official capacity claims would have been the same in Wisconsin courts as it was in federal court.

Though the appellate court recognized the outcome would be the same in both Wisconsin and federal courts, they held that there is no "futility" exception under the removal statutes citing Primate Protection League v. Tulane, 500 U.S. 72 (1991). App. 5. Actually even this conclusion may be invalid since the subsequent history of the Primate Protection League may well suggest that, where remand of a removed claim barred by Eleventh Amendment immunity would clearly be futile, dismissal of the claim by the federal court is the correct approach. *See* In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266 (5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh'g and reh'g en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). The Court decided remand to the State court was required after identifying legal and factual "uncertainties" about how the State courts might resolve the claims involved. Primate Protection League, 500 U.S. at 89. It then took "note" that the language of 28 U.S.C. § 1447(c), read literally, seemed to require remand where the district court lacked subject-matter jurisdiction, reversed the appellate decision and remanded to the district court with directions to remand the case back to the State court. *Id.* After the district court followed the instructions of the Supreme Court to remand the case to the State court, the case was

again removed to the district court. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 267-68. The district court concluded that the uncertainties identified by the Court were still unresolved and, on that basis, remanded to the State court once again. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 268. The appellate court, however, granted mandamus and vacated this second remand order holding that:

> The Supreme Court merely declined to speculate on hypothetical circumstances that were not then before it. **The problem is now a concrete one** [since the defendant removed the case a second time citing its authority under 28 U.S.C. § 1442(a)(1)] . . . . That the Supreme Court declined to speculate on whether [defendant meets a statutory definition] on the record before it, does not mean that the district court may remand these issues to the state court. Although it is not perfectly clear to us that any interpretation of state law is necessary, **even if it [were], a district court does not enjoy the luxury of remanding a case to a state court to interpret state law or to make a record**. The district court must decide for itself whether [the "uncertainties" identified in the Supreme Court decision render remand, after the subsequent removal, "futile".]

954 F.2d at 270.

The appellate court, facing the certainty that Wisconsin courts would, as it observed, dismiss the § 1983 claims against the State because the State is not a "person" under § 1983 (App. 5), should not have narrowed its analysis to whether a futility exception does or does not

exist. Instead, as defendants argued in their supplemental brief, this fact should have caused the appellate court to revisit the flawed reasoning in Frances J. and its progeny.

The proper approach was taken in a district court decision issued after Frances J., which, as here, addressed a removed action in which § 1983 claims were made against the State of Wisconsin. Weinberger v. State of Wis., 906 F.Supp. 485, 491 (W.D.Wis. 1995). The observations made in Weinberger apply here:

> It is true that the Eleventh Amendment is a bar to federal jurisdiction [citation omitted] and has no operative effect in the state courts, but plaintiff's state court suit against the state and against its employees in their official capacities would have gone aground for other reasons. In state court [in Wisconsin], the principle of sovereign immunity protects the state [of Wisconsin] from being sued without its consent. Moreover, neither the state nor its officials acting in their official capacities can be sued under § 1983 in **any** court, state or federal, because they are not "persons" under § 1983. [Citation omitted.] Therefore, even if defendants had not removed this case [from Wisconsin circuit court], plaintiff **could not have** proceeded against the state or against defendant Chester in her official capacity under § 1983.

906 F.Supp. at 491, emphasis added. The appellate court below acknowledged Weinberger, and its own decision in Smith v. Wisconsin Dept. of Agriculture, 23 F.3d 1134, 1139 (7th Cir. 1994) where, in another removed action, only the claims against the State were remanded to State

court and the district court disposition of other claims affirmed. App. 5-6. It sought to dismiss the contrary messages sent by those two decisions based solely on its view that "the jurisdictional issue was not called to the court's attention" in those cases. App. 5-6.

This is a curious and unsatisfactory response to Weinberger and Smith. Since the plaintiff in Weinberger, at the district court level, expressly "argue[d] that defendants should not be permitted to assert Eleventh Amendment immunity because they removed this case from state court" (906 F.Supp. at 491), and plaintiff here was completely silent about removal until the appellate court first raised the issue during oral argument (App. 5-6), the issue was far more concretely before the district court than it was here. Though Frances J. and its progeny are not cited in Weinberger, the same cannot be said for the appellate court's own decision in Smith. 23 F.3d at 1139. Smith, based expressly on Frances J. -- and addressing, presumably, "the jurisdictional issue" (App. 5-6) -- remanded to State court only those claims it deemed barred by Eleventh Amendment immunity, noting it could not be certain those claims would have been dismissed in Wisconsin courts. 23 F.3d at 1139. Despite Frances J., the Smith court affirmed the district court's rulings on the remaining claims in favor of the defendants on the merits. *Id.*

The Weinberger approach was the correct one. The appellate court should have moved past any questions about the propriety of removal, noting § 1983 claims cannot, from a definitional viewpoint, be made against the State, and instead addressed the merits already fully briefed before oral argument. Alternatively, the Smith approach could have been used to eliminate those claims the parties had fully litigated on the merits without any challenge to removal, and only remand to Wisconsin courts

those § 1983 claims against the State which were potentially subject to Eleventh Amendment immunity. The appellate court in this action instead considered the district court proceedings null and void and required the defendants to litigate this case all over again in State court. That conclusion is contrary to this Court's directives, as recognized by the appellate court itself in other settings, and contrary to Congressional intent, and should be corrected by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No.

In The

Supreme Court of the United States

October Term, 1996

WISCONSIN DEPARTMENT OF CORRECTIONS,
et al.

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Keith D. SCHACHT, Plaintiff-Appellant,

v.

WISCONSIN DEPARTMENT OF CORRECTIONS, et al., Defendants-Appellees.

No. 96-3633.

United States Court of Appeals,
Seventh Circuit.
Argued April 21, 1997.
Decided June 17, 1997.

Before BAUER, CUDAHY and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

The dispute in this case began when plaintiff Keith Schacht was discharged from his position as a correctional officer at the Oakhill Correctional Institution, located in Oregon, Wisconsin. Believing that the Wisconsin Department of Corrections (WDOC) and several officials at the correctional facility (acting in both their individual and official capacities) denied him his right to both substantive and procedural due process in the pre- and post-termination proceedings, Schacht filed suit in Dane County Circuit Court, alleging various violations of 42 U.S.C. § 1983. The defendants, relying on 28 U.S.C. § 1441(a), then removed the case to federal court, where the district court below dismissed the claims against the state defendants that were barred by sovereign immunity and granted summary judgment to the defendants on all remaining claims. Unfortunately, all of these efforts were for naught. Because the district court lacked subject matter jurisdiction over this case, we must vacate its judgment and instruct the district court to send all claims back to square one--Dane County Circuit Court.

I

On the morning of January 21, 1993, Keith Schacht had just completed his overnight shift at Oakhill and was headed for the exit door when he was stopped by defendant Captain Thomas Laliberte, who pulled Schacht aside and asked Schacht to empty his backpack. Schacht complied, and the ensuing search established that his backpack contained (among other things) two garbage bags, six pens, two pounds of government commodity butter, and a three-ounce tube of toothpaste. To the defendants, each of these items appeared similar to items used in the facility. Their presence in the backpack therefore confirmed the defendants' suspicions that Schacht had been stealing items from the prison. Schacht, however, maintained that the pens, butter, and toothpaste all belonged to him, and that it was a common practice, in which the prison management acquiesced, for Oakhill employees occasionally to take garbage bags for their personal use.

The upshot of all this for Schacht was a suspension without pay pending an investigation. The prison officials conducted a series of interviews and hearings, but Schacht believed the deck was stacked against him, as the hearings were conducted by Laliberte and Randall Hepp, both of whom Schacht believed were biased against him for being too much of a "by the book" officer. Ultimately, Schacht was formally discharged on February 18, 1993, and after aborted efforts at various grievance proceedings, Schacht filed suit in Wisconsin state court. In his complaint, which named the WDOC and a host of employees at Oakhill as defendants, Schacht asserted that he had been wrongfully discharged and deprived of his constitutionally protected liberty and property interests in continued employment, all in violation of the due process clause of the federal Constitution. The complaint asked for compensatory and punitive damages against all defendants, as well as costs, fees and any other relief the court deemed appropriate.

II

At this point, all was well. Unbeknownst to both sides, however, the roof fell in when the defendants removed (without objection from Schacht) the case to federal court and the district court proceeded to resolve the case on the merits. The Achilles' heel of the case was the group of claims for monetary damages against the WDOC and the state officials in their official capacities, which were barred by sovereign immunity. The presence of these claims meant that the district court did not have original jurisdiction over the entire action, and thus that the defendants' removal under 28 U.S.C. § 1441 was improper.

We explained why this is so in Frances J. v. Wright, 19 F.3d 337 (7th Cir.1994), in which state defendants similarly tried to remove an action containing claims barred by state sovereign immunity as reflected in both the Eleventh Amendment and Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). We concluded that the district court lacked jurisdiction over the case because sovereign immunity acted as a limit on the original subject matter jurisdiction of the courts with respect to the barred claims (rather than as a form of common law immunity). Frances J., 19 F.3d at 340, citing Crosetto v. State Bar of Wisconsin, 12 F.3d 1396, 1400 (7th Cir.1993). The lack of jurisdiction over some claims in the case precluded removal of the action as a whole, because § 1441(a) confers removal jurisdiction only where the district court has the authority to adjudicate all of the claims in the case. Frances J., 19 F.3d at 341. In so holding, we rejected the notion that the district court could cure this problem by simply dismissing or remanding the barred claims. Section 1441(c) contemplates certain cases in which separate and independent removable claims are joined with others that are not removable, but it gives the district court the choice of retaining the full case and "determining all issues" therein, or remanding all matters in which state law predominates. As we pointed out in Frances J., this implies that the district court must have the power to determine all the issues in the case, either through original

or supplemental jurisdiction. Claims barred by sovereign immunity stand on different footing than other claims that are not independently removable, because of the affirmative limitation on jurisdiction imposed by the sovereign immunity doctrines. See Frances J., 19 F.3d at 340 n. 4. Under § 1441, "if even one claim in an action is jurisdictionally barred from federal court by a state's sovereign immunity, or does not otherwise fit within the original or supplemental (see 28 U.S.C. § 1367) jurisdiction of the federal courts, then, as a consequence of § 1441(a), the whole action cannot be removed to federal court." Frances J., 19 F.3d at 341. See also International College of Surgeons v. City of Chicago, 91 F.3d 981, 987 (7th Cir.1996) ("removal is proper only if the action originally could have been brought in the district court"), cert. granted, --- U.S. ----, 117 S.Ct. 1424, 137 L.Ed.2d 534 (1997); Gorka by Gorka v. Sullivan, 82 F.3d 772, 774-75 (7th Cir.1996) (following Frances J.); 28 U.S.C. § 1441(a) (discussing removability of actions, rather than claims).

In Schacht's case, it is evident that at the time of removal, the complaint included several claims that were barred by sovereign immunity. Schacht wanted monetary relief from the WDOC and from five Oakhill employees, whom he was suing in both their official and individual capacities. Since the State of Wisconsin would be the real party in interest with respect to the official capacity and WDOC claims, the district court could not adjudicate those claims without an authoritative waiver of the state's sovereign immunity. See Frances J., 19 F.3d at 342, citing Dugan v. Rank, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963) (noting that a lawsuit is against a sovereign if the judgment from successful claims would inevitably be paid from the public treasury). See also Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305-06, 110 S.Ct. 1868, 1872-73, 109 L.Ed.2d 264 (1990) (A state's waiver of sovereign immunity must be explicit and unambiguous). The defendants here and the district court below were undoubtedly aware of this problem, as it took no time for the district court to grant the defendants' motion to dismiss the claims against the WDOC and the

Oakhill employees in their official capacities. As we noted above, however, the dismissal of the barred claims on the merits did not cure the initial defect in removal.

At oral argument, we raised the issue of jurisdiction and the propriety of removal sua sponte, and requested supplemental briefing from both sides on the relevance of Frances J. to this case. See Edelman v. Jordan, 415 U.S. 651, 677-78, 94 S.Ct. 1347, 1362-63, 39 L.Ed.2d 662 (1974) (subject matter jurisdiction can be addressed at any stage of a given legal proceeding). Schacht opted to concede the jurisdictional flaw, but the defendants contend that we may reach the merits of this case notwithstanding Frances J. because remand would be futile and would result in a waste of judicial resources. Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See Lindas v. Cady, 150 Wis.2d 421, 441 N.W.2d 705, 709 (1989) (noting that "states are not 'persons' within the meaning of § 1983"). See also Arizonans for Official English v. Arizona, --- U.S. ----, ----, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997) (noting that "sec.1983 actions do not lie against a State").

Even if the defendants have accurately forecast the fate of this case on remand, we are not free to disregard a jurisdictional defect. See Arizonans, --- U.S. at ----, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility" exception to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See Primate Protection League v. Tulane Educational Fund, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed.2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.") (Emphasis added). Furthermore, in Smith v. Wisconsin Dept. of Agriculture, we rejected an identical "futility" argument, instead holding that remand was required even if the state court would only respond by

dismissing the remanded claims. 23 F.3d 1134, 1139 (7th Cir.1994). Although in some previous cases involving the removal of claims barred by sovereign immunity (of which Smith was one), we have remanded only the barred claims, while deciding the remaining claims on the merits, the jurisdictional issue was not called to the court's attention. See, for example, Smith, 23 F.3d at 1142-43. See also Weinberger v. Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis.1995), judgment aff'd, 105 F.3d 1182 (7th Cir.1997). They do not, therefore, support the proposition that the Frances J. rule is limited in its application. Last, while the principles of judicial economy are not to be taken lightly, these principles cannot override constitutional or statutory limits on subject matter jurisdiction. We regret that the improper removal in this case will lead to yet additional litigation, but we remind both sides that much time and effort could have been saved had further consideration been given to the propriety of removal at the outset.

We therefore VACATE the judgment of the district court, and REMAND this case with instructions for the district court to remand the entire action to state court. Although Schacht requested costs and attorneys' fees in his supplemental brief, we agree with the state that his request was improperly presented and without merit in any event. Each side is to bear its own attorneys' fees and costs on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHAC[H]T,
Plaintiff,

v. MEMORANDUM AND ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE and RANDALL HEPP,
Defendants. 96-C-122-S

Plaintiff Keith D. Schac[h]t commenced this civil action pursuant to 42 U.S.C. §1983 in Dane County Circuit Court. Defendants Wisconsin Department of Corrections, Catherine J. Farrey, Cynthia O'Donnell, Rita Smick, Thomas Laliberte and Randall Hepp removed the action to this Court. Plaintiff alleges that he was suspended without pay and subsequently terminated from his employment by the defendants without due process of law.

On July 15, 1996 defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere

allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Keith D. Schact [sic] was employed as a correctional officer at Oakhill Correctional Institution, Oregon, Wisconsin (OCI). Defendant Wisconsin Department of Corrections is an agency of the State of Wisconsin. At all times material to this action, defendant Catherine J. Farrey was the warden, and defendant Cynthia O'Donnell was the associate warden at OCI. Defendant Rita Smick was the personnel officer. Defendants Thomas Laliberte and Randall Hepp were correctional officers.

On February 8, 1992 plaintiff attested in writing that he had carefully read the Department of Corrections Work Rules and Code of Ethics. The Work Rules provided in pertinent part as follows:

> All employees of the Department are prohibited from committing any of the following acts:
>
> ....
>
> 3. Stealing or unauthorized use... of state-owned or leased property, equipment or supplies.
>
> 7. Failure to provide accurate and complete information when required by management....

Plaintiff knew that a violation of these Work Rules was considered sufficient grounds for disciplinary action ranging from reprimand to immediate discharge.

Prior to January 21, 1993 defendant Farrey suspected, based on a written statement by Sergeant B. J. Mikkleson and reports by inmates, that plaintiff was stealing food. On this information she authorized a search of plaintiff to be conducted as he was walking toward the parking lot after his shift.

Defendant Laliberte asked plaintiff as he was leaving Oakhill on January 21, 1993 to return to the Administration Building. Plaintiff's union representative was also present. Defendant Laliberte searched plaintiff's backpack. He found two pounds of butter wrapped in two plastic garbage bags, six pens and one 3 ounce tube of toothpaste. The two plastic bags were Oakhill property. Defendant Laliberte spoke to Bill Hartwig, the Food Service Manager, concerning the butter and its labeling used by Oakhill. It matched the butter in plaintiff's backpack. Defendant Laliberte suspended plaintiff without pay pending an investigation.

Defendants Laliberte and Randall Hepp held investigatory interviews with plaintiff on February 4, 1993 and February 12, 1993. It is disputed whether or not plaintiff provided accurate and complete information during these meetings. It is also disputed whether defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith.

A pre-disciplinary meeting was held with plaintiff on February 17, 1993 with a union representative present on plaintiff's behalf. Plaintiff had received notice of the meeting at least 24 hours prior to the meeting informing him of its purpose. At the meeting Plaintiff was told that there was a factual basis for finding he had violated Work Rule 3, removing state owned property without authorization and Work Rule 7, failing to provide complete and accurate information. He was advised that the potential discipline for such violations was termination.

Plaintiff was asked whether he had any statement he would like to and he replied, "No".

On February 18, 1993 a meeting was held with plaintiff and his union representative at which a letter dated February 18, 1993 from Farrey terminating his employment was read. Plaintiff was again asked if he wished to make a statement and he declined.

Plaintiff applied for unemployment compensation benefits after he was suspended without pay on January 21, 1993 and filed an additional application after he was discharged from employment effective February 18, 1993. Under plaintiff's union contract he had rights to file grievances challenging both the suspension without pay and the discharge. He pursued his grievances through the third step of the discharge. He pursued his grievances through the third step of the process. On June 3, 1993 the union decided not to pursue plaintiff's grievance to arbitration.

MEMORANDUM

Plaintiff claims that he was deprived of property and liberty interests in violation of the Fourteenth Amendment due process clause pursuant to 42 U.S.C. § 1983. Defendants contend that plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities are barred by the Eleventh Amendment. Plaintiff agrees his claims for money damages are barred but pursues his claims for injunctive relief. Plaintiff does not, however, request injunctive relief in his complaint and such relief is not appropriate where plaintiff is seeking monetary relief rather than reinstatement. Defendants' motion to dismiss plaintiff's claims against the Wisconsin Department of Corrections and the individual defendants in their official capacities will be granted.

Plaintiff seeks to add Sergeant B. J. Mikkleson as a defendant in this action. This motion will be denied as untimely under Rule 20, Federal Rules of Civil Procedure. There are no allegations that Mikkleson participated in the

decisions to suspend or terminate plaintiff or that he denied him due process protections. Nor is there any reason to delay trial at this late date in the event further proceedings should become necessary as a result of the addition requested. Final pre-trial conference and discovery have been held and completed respectively.

Plaintiff claims that he was deprived of his continued employment without procedural due process protections when he was suspended without pay on January 21, 1993 and terminated on February 18, 1993. For purposes of deciding defendants' motion for summary judgment it is assumed that plaintiff had both protected property and liberty interests in his continued employment. Defendants move for summary judgment based ont he ground that plaintiff received the due process protections to which he was entitled. Any disputes of fact remaining concerning plaintiff's conduct or the investigation itself are not material or relevant to resolve defendants' motion.

In his complaint and brief in opposition to defendants' motion for summary judgment plaintiff pursues a procedural due process claim and further contends that defendants conspired to terminate his employment, trumped up false charges against him and acted in bad faith. He claims he was not treated fairly and impartially. Although not pursued by either party plaintiff may be arguing that this unfairness violated his substantive due process rights.

The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them. Zinermon v. Burch, 494 U.S. 113, 125 (1190). To state a substantive due process claim, in addition to alleging that the decision was arbitrary and irrational, plaintiff must show either a separate constitutional violation or the inadequacy of state law remedies. New Burnham Prairie Homes v. Village of Burnham, 910 F. 2d 1474, 1481 (7th Cir. 1990). Plaintiff has neither alleged nor shown a separate constitutional violation. Further, he has not alleged or shown the inadequacy of state law remedies. Finally, plaintiff has

neither stated a substantive due process claim nor cited any authority for it.

Accordingly, the Court addresses plaintiff's only claim, that of procedural due process. Plaintiff was suspended without pay on January 21, 1993. He did not receive an opportunity to be heard prior to his suspension. The Seventh Circuit Court of Appeals addressed the question of whether a pre-suspension hearing is a required procedural due process protection in Jones v. City of Gary, Indiana, 57 F. 3d 1435 (7th Cir. 1995). The Court applied the three factors provided in Matthews v. Eldridge, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Applying these factors to the case of Jones, a firefighter, who was suspended without pay for failing to return to work from sick leave, the Court held as follows:

> Thus, there was no risk that Jones was erroneously deprived of his protected interest in employment without a pre-suspension hearing and thus we hold that Jones was not denied due process by the failure of the fire department to provide him with a pre-suspension hearing.

Jones, 57 F.3d at 1443.

In Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F. 3d 623 (7th Cir. 1995), the Court held that a bus driver who was suspended without pay after an accident was not entitled to a pre-suspension hearing under the due process clause. The Court stated at p. 628:

> Applying *Matthews* and these subsequent cases to the facts at hand, we have little trouble concluding that due process did not mandate giving Chaney additional notice or a hearing before Pace suspended him. Chaney's interest in avoiding a suspension is significant. Nevertheless, Chaney was on notice to why he was being suspended and Pace's interest in both managerial efficiency and in public safety clearly outweigh Chaney's interest in a pre-suspension hearing. The Constitution does not mandate additional protections at this stage.

Here plaintiff was a correctional officer accused of stealing. He was suspended without pay on January 21, 1993 without an opportunity to be heard. Plaintiff was advised of the reason for this suspension. Using the Matthews factors, the government's interest in the efficient and safe operation of the correctional institution outweighs the plaintiff's interest in a pre-suspension hearing. An investigation was conducted after the suspension and plaintiff was given an opportunity to be heard in two interviews and at a pre-disciplinary hearing. These procedures lessened the risk of an erroneous deprivation of plaintiff's protected interests. Due process does not require that plaintiff be provided a pre-suspension hearing.

Plaintiff also claims that he was denied due process protections when he was terminated on February 18, 1993. In Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542-43 (1985), the United States Supreme Court held that a person who has a property interest in employment may not be discharged without a prior opportunity to hear the employer's evidence and respond to the claims against him. The pre-termination opportunity to be heard need not be elaborate if there is timely post-termination process. Id. The Court held in Chaney that due process required a pre-termination notice and an opportunity to respond where a bus driver was terminated after an accident even where post-termination procedures exist. The Court further

found that the grievance and arbitration procedures satisfied the requirements of post-deprivation due process.

It is undisputed that plaintiff was provided notice that he may be terminated for alleged violation of work rules. He was provided an opportunity to be heard at two investigatory interviews. At a pre-disciplinary hearing on February 17, 1993 he was given an opportunity to be heard on the charges. When the letter of termination was read to him at a meeting the following day he was also given an opportunity to make a statement. Plaintiff was given notice and an opportunity to be heard prior to his February 18, 1993 termination. This satisfied the pre-termination due process requirement.

Subsequent to his termination plaintiff pursued the grievance procedures available to him. These procedures satisfied the requirements of post-deprivation procedural due process.

Plaintiff received the procedural due process protections to which he was entitled concerning both his suspension and his termination. Accordingly, defendants' motion for summary judgment will be granted.

ORDER

IT IS ORDERED that plaintiff's motion to add Sergeant B.J. Mikkleson as a defendant is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of the defendants against the plaintiff DISMISSING his complaint and all claims contained therein with prejudice and costs.

Entered this 13th day of September, 1996.

BY THE COURT:
/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

KEITH D. SCHACHT,
Plaintiff,

v.

ORDER

WISCONSIN DEPARTMENT OF CORRECTIONS, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, and RANDALL HEPP,
Defendants.

96-C-122-S

Pursuant to judgment previously entered in the above entitled matter by the United States Court of Appeals for the Seventh Circuit on June 17, 1997,

ORDER

IT IS ORDERED that the above entitled action is REMANDED in its entirety to the Circuit Court for Dane County, Wisconsin.

Entered this 15th day of July, 1997.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT BRANCH 13

KEITH D. SCHACHT,

Plaintiff,

v. Case No. 95 CV 3087

WISCONSIN DEPARTMENT OF CORRECTIONS, KATHRYN J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP and ONE OR MORE JOHN DOES,

Defendants.

ORDER GRANTING MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF CERTIORARI

This court having before it defendants' Motion to Stay Proceedings Pending Resolution of Petition for Writ of Certiorari, and being advised in the premises, and finding that Motion proper and one which should be granted, IT IS HEREBY ORDERED that this proceeding is stayed pending resolution of the Petition for Writ of Certiorari which defendants represent they will be filing by September 15, 1997, that defendants are to provide this court with a copy of that Petition after it has been filed, and that defendants' counsel is to inform this court, and opposing counsel, of the resolution of that Petition within twenty (20) days after that resolution by the United States Supreme Court.

Dated this 29th day of August, 1997.

BY THE COURT:
/s/ Michael Nowakowski
Michael Nowakowski
Circuit Court Judge